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90-873
No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ONE PARCEL OF REAL ESTATE
C/K/A 916 DOUGLAS AVENUE,
ELGIN, ILLINOIS,

Defendant,

PAUL F. BORN III,

Petitioner-Claimant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

Paul F. Born III
Claimant-Petitioner, pro se
P.O. Box 1000
Oxford, WI 53952

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I
QUESTIONS PRESENTED FOR REVIEW

1. Whether a "substantial connection" test must be demonstrated between the defendant real estate and a narcotics transaction before the real estate can be forfeited to the government under the Civil Forfeiture Code, Title 21 U.S.C. 881(a)(7)?

a. Whether two telephone calls from a government agent to a telephone at the defendant real estate wherein a cocaine sale is discussed, and a subsequent sale some twenty miles away constitutes a "substantial connection" between the real estate and the illegal drug transaction?

2. Whether the misapprehension of the factual circumstances underlying this forfeiture proceeding, as demonstrated by the opinion below, served to deny the petitioner-claimant due process of law under the 5th Amendment to the United States Constitution?

LIST OF PARTIES IN THE COURT OF APPEALS

The United States of America, as Plaintiff-Appellee.

Paul F. Born II, petitioner, as Claimant-Appellant.

One Parcel of Real Estate, C/K/A 916 Douglas Avenue, Elgin, Illinois, as Defendant.

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REFERENCE TO REPORTS

The opinion of the Court of Appeals is reported at 903 F2d 490 7th Cir. 1990. The opinion also appears as Appendix A to this petition.

The District Court did not issue a published decision however, the judgement order of the District Court appears as Appendix C to this petition.

GROUNDS FOR INVOCATION OF JURISDICTION

(I) The judgement of the Court of Appeals was entered on May 29, 1990.

(ii) A timely petition for rehearing was filed by this petitioner, and an order denying that petition was entered on July 16, 1990. This order appears as Appendix B to this petition.

(iii) Petitioner requested an extension of time from this Court on September 27, 1990 in which to file this petition, which wa granted on October 1, 1990. This Order appears as Appendix D to this petition.

(iv) No cross petition has been filed.

(v) Jurisdiction to review the judgement by Writ of Certiorari is conferred on this Court by Title 28 United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Amendment V to the constitution of the United States provides, in relevant part that:

   "No person shall be ... deprived of life, liberty or property without due process of law ..."

2. Title 21 United States Code, Section 881(a)(7) provides, in relevant part that:

   (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

   (7) All real property, including any right, title, and interest in the whole of any lot or tract of land and appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

3. Title 21 United States Code, Section 841 provides, in relevant part that:

   (a) Except as authorized by this subchapter, it shall

be unlawful for any person knowingly or intentionally -

(1) ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

4. Title 21 United States Code, Section 843 provides in relevant part that:

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" ... includes ...telephone ... and all other means of communication.

CONCISE STATEMENT OF THE CASE

Paul F. Born III, petitioner, was charged in August of 1986 by the State of Illinois with the delivery of a controlled substance. (State of Illinois, Cook County Criminal No.87-1939). This charge was dismissed against petitioner on September 25, 1989 at the behest of the state. (Appendix E).

The United States Attorney filed a verified Civil complaint on October 9, 1986 in the Northern District of Illinois seeking the forfeiture of petitioner's family home pursuant to Title 21 U.S.C. 881(a)(7) for allegedly

committing acts in violation of Title 21 U.S.C. 841(a)(1) & 843(b).

Petitioner filed a verified claim on November 7, 1986. The district Court, Honorable Charles P. Kocoras, District Court Judge, held a bench trial on October 3, 1988. (Tr. 1). The court ordered petitioner's one third interest in the home forfeited to the government. (Tr. 69). (The court recognized the 2/3 interest held by petitioner's parents as a protected interest). (Appendix A, p.3, n.3).

EVIDENCE FOR THE PROSECUTION

According to the goverment's evidence, petitioner met Chuck Krazny at a restaurant and was introduced to "Phil" (Undercover Investigator John Mueller of the Cook County State's Attorney's Office) on February 20, 1986. (Tr. 5-6, 11, 23). Mueller attempted to sell petitioner cocaine, however, petitioner declined. (Tr. 6, 11, 23). Mueller and Born exchanged numbers in order to stay in touch. (Tr. 7, 12, 23). Petitioner never contacted Mueller. (Tr. 12, 13).

From February 20, 1986, until April 15, 1986, Mueller did not speak to petitioner and petitioner never "beeped" Mueller. (Tr. 7, 12, 13).

On April 15, 1986 Mueller called petitioner at his home (the defendant real estate) in an attempt to purchase cocaine from petitioner. (Tr. 7, 13). Mueller told petitioner he needed two ounces of cocaine. (Tr. 7, 13). Mueller says that petitioner told him it would be no problem, the price would be $1,600 per ounce and that Mueller should call him again the next

morning to set a time and place. (Tr. 7-8). Mueller never spoke to petitioner again. (Tr. 16, 25).

Mueller called petitioner's home again the next morning but did not speak to petitioner, instead he spoke with Don Mazzanti. (Tr. 8, 13-14). Mueller told Mazzanti that he was looking for two ounces of cocaine. (Tr.9). Mazzanti told Mueller that he should contact him later when petitioner got up. (Tr. 9).

Mazzanti called Mueller later that day and set up a meeting for 9:30 p.m. that evening at a bar in Streamwood, Illinois. (Tr. 9, 14).

At approximately 9:30 p.m. on April 16, 1986 Mueller and Mazzanti met as arranged and concluded the two ounce cocaine deal. (Tr. 9-10, 14).

Neither petitioner or Mazzanti were criminally charged with violations of Title 21 U.S.C. 841(a)(1) or 843(b) in state or federal court. Both petitioner and Mazzanti were charged with State of Illinois charges of Delivery of a Controlled Substance. These charges were dismissed against petitioner, Mazzanti plead guilty to the two ounce delivery to Mueller. (Appendix E, Tr. 41).

(A detailed account of the evidence, as viewed most favorably to the government is set forth in the court of appeals opinion, Appendix A. Petitioner claims however that important factual errors are evident in that detailed account and that these errors account for the improper result achieved by the lower courts.

PETITIONER'S EVIDENCE AND THEORY

Petitioner specifically denied participation in the transaction with Mueller. (Tr. 25). Petitioner did acknowledge that Mueller attempted to enlist his aid to obtain cocaine for Mueller, but stated that he didn't know if he could help him. (Tr. 25). Mueller asked petitioner to try and find him some and that he would call petitioner the following day. (Tr. 25). Mueller never spoke to petitioner again. (Tr. 25).

On the morning of April 16, 1986 Mueller again called petitioner's residence and spoke with Mazzanti. (Tr. 41-42. 46-47). Mueller told Mazzanti that he was looking for two ounces of cocaine and Mazzanti stated that it would be no problem and that he would contact Mueller later. (Tr. 9, 42).

Later that day Mazzanti called Mueller and set up a meeting for 9:30 that night at the Player's Lounge on Barrington Road in Streamwood, Illinois. (Tr. 9, 14, 43). Mazzanti obtained the cocaine from someone named Oscar DeLyle. (Tr. 44). Then at 9:30 that night met Mueller as arranged and concluded the cocaine deal. (Tr. 9, 14, 43).

The Player's Lounge is located some twenty miles from the defendant real estate. (Tr. 26).

Mazzanti later entered a plea of guilty to delivering the two ounces of cocaine to Mueller and was sentenced to seven years in the Illinois Department of Corrections. (Tr. 41). The charge of delivering a controlled substance was dismissed against petitioner on September 25, 1989. (Appendix E).

Mueller was never inside the defendant real estate. (Tr. 16). There was no evidence of any drugs being on the premises of the defendant real estate. (Tr. 52-53). There was no evidence that the home was to be the site of any drug transaction or that it had ever been the site of any other drug involvement other than the two phone calls received from Mueller. (Tr. 25-26).

STATE COURT PROCEEDINGS

The factual predicate acts that are the basis for this forfeiture proceeding were the subject of criminal proceedings against petitioner and Donald Mazzanti.

Mr. Mazzanti entered a plea of guilty to the delivery of the two ounces of cocaine to Mueller and was sentenced to serve seven (7) years in the Illinois Department of Corrections. (Tr. 41).

The charge against petitioner was dismissed on September 25, 1989. (Appendix E).

BASIS OF FEDERAL JURISDICTION

This case involves the Civil Forfeiture of a citizens home under Title 21 United States Code, Section 881(a)(7) for alleged violations of Title 21 United States Code, Sections 841(a)(1) and 843(b).

The District court assumed jurisdiction pursuant to Title 28 United States Code, Sections, 1345, 1355.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE "SUBSTANTIAL CONNECTION" TEST

The conflict between the Circuits

On the face, the statute at issue here calls for the forfeiture of all real property which is "used in any manner or part" to facilitate the commission of a violation of the federal drug laws. Title 21, United States Code, Section 881(a)(7).

In the opinion below, the Seventh Circuit rendered a decision in conflict with the majority of the circuits that have approached the real estate forfeiture provision at issue in the case before Your Honors.

In the Seventh Circuits view, a forfeiture under Title 21 U.S.C. 881(a)(7) may go forward it there is more than an incidental or fortuitous nexus between the violation of Title 21 and the real property. (App. A, p.9).

The court recognized that the decision was in conflict with U.S. v. Santoro, 866 F.2d 1538 (4th Cir. 1989); U.S. v. Schifferli, 895 F.2d 987 (4th Cir. 1990); and U.S. v. Premises Known as 3639-2ND Street, N.E., 869 F.2d 1093 (8th Cir. 1989)(App. A. p.1, n.1, p.7). Nevertheless, it affirmed the forfeiture with a factual predicate of an isolated drug transaction, conducted by someone other that a party in interest, and occurring some 20 miles from the defendant real estate. (App. A, p.3).

The sufficient nexus in this case is two phone calls

from an agent of the state to the defendant real estate wherein the subsequent drug deal was discussed. (App. p.2, 3). See U.S. v. All Those Certain Lots in Virginia Beach, 657 F. Supp. 1062 (E.D. Va. 1987) (where the government was denied forfeiture of a persons home based on the fact that only one isolated transaction could be connected to the real estate). In the case before Your Honors the connection to the defendant real estate is even more nebulous. Here there were no drugs on the premises at any time, here there was no allegation that a drug deal ever took place on the real estate, the only connection is based on violations of Title 21 U.S.C. 843(b), the two phone calls. U.S. v. 124 East North Ave., Lake Forest, Illinois, 651 F. Supp. 1350 (N.D. Ill. 1987) (an isolated use of a phone at a home to discuss a narcotics sale might not be a sufficient basis to subject the home to 881 forfeiture).

Most of the circuits which have approached the forfeiture provision at issue here have required the government to show a "substantial connection" between the real estate and the prohibited drug activity. There are substantial differences of opinion on the requirements that need to be met before the government is allowed to forfeit a persons home, meaning that citizen's rights vary greatly, depending on where in the country they find themselves:

A. **FIRST CIRCUIT:** U.S. v. One Parcel of Real Property, 900 F2d 470 (1st Cir. 1990), applied a "substantial connection" test stating that "the government must establish probable cause to believe that there was a substantial connection between the claimant's property and drug trafficking." *Id.* at 472.

B. **SECOND CIRCUIT:** In U.S. v. Property at 4492 S. Livonia Rd., Livonia, 889 f.2D 1258 (2nd Cir. 1989) the court there stated that "our cases have phrased the test somewhat differently, ... requiring a sufficient nexus." (citations omitted). *Id.* at 1269.

C. **THIRD CIRCUIT:** U.S. v. Property Known as 6109 Grubb Road, 886 F.2d 618 (3rd Cir, 1989) tracked the Joint Explanatory Statement of Title II and III, 124 Cong. Rec. S17647 October 7, 1978) *reprinted at* 1978 U.S. Code Cong. & Admin. News 9518, 9522 (1979) in stating that "property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." *Id.* at 625

D. **FOURTH CIRCUIT:** "For property to be forfeitable under 21 U.S.C. 881(a)(7) there must be a substantial connection between the property and the underlying criminal activity." U.S. v. Santoro, 866 F.2d 1538 (4th Cir. 1989) *Id.* at 1542 (citations omitted). "This standard is a common sense interpretation of the statute, which is consonant with the congressional intent that the instrumentalities of the drug trade be reached, while ensuring that property only fortuitously connected with drug trafficking be preserved." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 195, *reprinted in* 1984 U.S. Code Cong. & Ad.News, 3182, 3378. *See also* U.S. v. Schifferli, 895 F.2d 987 (4th Cir. 1990)(same).

E. **FIFTH CIRCUIT:** U.S. v. One 1978 Mercedes Benz Four-Door Sedan, 711 F.2d 1297 (1983) held that "this circuit has rejected the 'substantial connection" test finding that a section 881 forfeiture is proper if the vehicle in question was used "in any manner" to

facilitate the sale or transaction of a controlled substance..." citing U.S. v. 1964 Beechcraft Baron Aircraft, 691 f.2D 725, 727 (5TH Cir. 1982), *cert. den.* _____ U.S. _____, 103 S.Ct. 1893, 77L.Ed.2d 283 (1983). However, this case was decided on the basis of 21 U.S.C. 881(a)(4) and is for the forfeiture of personal property and not a citizen's home that is at issue in this case before Your Honors.

F. **SIXTH CIRCUIT:** The court there ruled that the "United States must establish probable cause to believe that a 'substantial connection' exists between the property to be forfeited and the illegal exchange of the controlled substance." U.S. v. 526 Liscum Dr., Dayton, Montgomery County, 866 F.2d 213 (6th Cir. 1988) *Id.* at 217

G. **SEVENTH CIRCUIT:** U.S. v. Real Property Known as 916 Douglas Ave., 903 F.2d 490 (7th Cir. 1990) is the case before Your Honors where the court below applied a "sufficient nexus" standard forfeiting a citizen's home on the basis of two phone calls made to the defendant real estate in connection with a subsequent drug sale by a third party with no interest in the real estate. In U.S. v. Various Parcels of Real Property, 650 F. Supp. 62 (N.D. Ind. 1986) the lower court in Indiana applied the "substantial connection" test to the real estate in that case citing as authority the Joint Explanatory Statements of Title II and III, *reprinted in* 1978 U.S. Code Congressional and Ad.News, p. 9522. (citations omitted) *Id.* at 65.

H. **EIGHTH CIRCUIT:** The court in U.S. v. Premises Known as 3639-2nd St., N.E., 869 F.2d 1093 (8th Cir. 1989) held "there must be a substantial

connection between the property being forfeited and a drug-related crime." In that case there were on-site transactions and drug paraphernalia confiscated directly on the property. (concurring opinion of Judge Arnold at 1098).

I. **NINTH CIRCUIT:** The court has rejected the "substantial connection" test in U.S. v. $5,644,540 in U.S. Currency, 799 F.2d 1357, 1362 (9th Cir. 1986) holding that "we decline to read a substantial connection requirement into the forfeiture statute." This case was premised upon personal property and not on Real Property which is the subject matter at issue in this petition.

J. **TENTH CIRCUIT:** NO REPORTED DECISIONS.

K. **ELEVENTH CIRCUIT:** U.S. v. Property in Greene & Tuscaloosa Counties, 893 F.2d 1245 (11th Cir. 1990) held that the government must show that "a substantial connection exists between the property to be forfeited and on illegal exchange of a controlled substance." This court relied upon prior decisions in that circuit which required the government to establish a "substantial connection" between the illegal activity and the property. U.S. v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., 803 F.2d 625 (11th Cir. 1986) supra Greene & Tuscaloosa at 1249.

Virtually all of the cases that have been decided have had as a factual premise an on-site drug transaction when the government succeeded in its forfeiture pursuit. *e.g.:* One Parcel of Real Property, *supra* at 471-2; Property at 4492 Livonia Rd., *supra* at

1269: Santoro, *supra* at 1542; Schifferli, *supra* at 991; Premises Known as 3639-2nd Street, N.E., *supra* at 1094-95.

This practical distinction separates the cases decisively. Here the factual predicate for the forfeiture of the defendant real estate are two phone calls from a State of Illinois Investigator attempting to purchase drugs from the claimant, or anyone who answered the phone. (Tr. 7, 13)(App. A 2, 3). The government did not contend nor allege that drugs were ever kept on the premises of petitioner's home, nor was there any indication that the home was to be the site of any drug transaction. (Tr. 16).

The opinion of the Appellate Court in this case states that "we will look beyond the express language of a statute only where that statutory language is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme." See United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978)(emphasis added).

The statutory scheme at issue in this case, Title 21 U.S.C. 881(a)(7), on its face calls for the forfeiture of real property that "in any manner or part" is used to commit or facilitate the commission of a violation of the drug laws.

The purpose behind the enactment of the forfeiture laws was to strip drug dealers of their economic power. Senator Culver, one of the sponsors of the bill, stated that Section 881 "would provide the United States with strong new weapons to combat the diversion of psychotropic drugs into illicit channels, to stem the alarming increase in the use of PCP, and to strike at

the profits of illegal drug trafficking." 124 Cong. Rec. S34667 (1978)

Congress stated, when passing the Psychotropic Substances Act of 1978, Pub. L. 95-633, 92 Stat. 3768 that,:

> 'due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." Joint Explanatory Statement of Titles II and III, 124 Cong. Rec. S17647 (October 7, 1978 U.S. Code Cong. & Ad.News 9518, 9522 (1979)(Emphasis added).

It is quite clear that Congress intended the statutes to be a powerful deterrent to becoming involved in drug trafficking. However, it is equally clear that the Congressional purpose behind the passage of the forfeiture laws was not to forfeit when the property has only an incidental or fortuitous connection to criminal activity. See D. Smith, Prosecution and Defense of Forfeiture Cases, @4.02(6), at 4-16(1989). Applying the sufficient nexus standard as enunciated in the opinion below has not only led to an absurd and irrational result, but has thwarted the intent of the Congress, misapplying the standard that needs to be met for a forfeiture to succeed. (See e.g., remarks of Senator Culver, *supra;* Joint Explanatory Statement of Titles II and III, *supra* Property Known as 6109 Grubb Rd.,; *supra*, at 625; Various Parcels of Real Property, *supra*, at 65; Certain Lots, *supra*, at 1064-65; and Santoro, *supra*, at 1542).

In a recent article published by the Fordham Law Review the "substantial connection" test as applied by the majority of the circuits was deemed to be what Congress intended to be the proper course the courts should follow in real estate forfeitures:

> "Congress did not intend for real property only circumstantially or fortuitously connected to a drug violation to be subject to forfeiture.
>
> Moreover, policy considerations suggest that real property, especially homes, should not be subject to forfeiture on the basis of a circumstantial relationship to a prohibited act. The home has traditionally been provided extra protection by the courts. If Congress had intended section 881(a)(7) to reach homes less than substantially related to a drug offense, it is reasonable to expect that a specific reference to such a shift in policy would have been made." The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984, FORDHAM LAW REVIEW, V. LVIII, No. 3, December 1989. (Cited with approval)(Emphasis added)(Citations Omitted).

To apply any other standard to the forfeiture provisions under Title 21 U.S.C. 881(a)(7) than the requirement that a substantial connection be shown would not only countermand the dictates of Congress but would also lead to the courts affording personal property more protection under the forfeiture provisions than is afforded a persons home. The Senate Report on the proposed Comprehensive Crime Control Act of 1984 makes clear the purpose of the forfeiture provision.

> Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marihuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent. S.Rep. No. 225, 98th Cong., 1st Sess. 195, reprinted in 1984 U.S. Code cong. & Ad.News 3182, 3378 (emphasis added).

It is clear that this statute was passed for the sole purpose of closing a loophole in the civil forfeiture laws: the inability of the government to reach real property in forfeiture proceedings. Certain Lots, *supra*, at 1064. This erosion of the protection of the home inferentially connected to a drug violation reverses this Courts teachings in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed2d 1000 (1976):

> "(The) Courts have traditionally drawn a distinction between one's personal property and one's home, according the latter far greater protection under the law..."(emphasis added). at U.S. 367-68.

The lower courts refusal to apply the substantial connection test advanced by the other circuits has not only misconstrued the statutory intent of the forfeiture provision but has also eliminated any deference the courts have traditionally afforded the home, especially considering the facts of this case. The nexus between

the defendant real estate and an illegal narcotics transaction is so scant as to border on the non-existent.

Moreover, the requirement that a substantial connection be shown between real property sought to be forfeited and illegal drug activity is necessary for compliance with the spirit of Title 21 U.S.C. 881(a)(7).

a. Applying the "substantial connection" test to the facts.

Here, Mr. Born and his wife lived in the defendant real estate for about twenty years. (Tr. p. 22). There was no evidence offered that cocaine was ever distributed in the house, or that any narcotics were ever on the premises. In fact, Detective Mueller was never in the house. (Tr. p. 16). The only evidence linking the house to narcotics consists of two telephone calls to the house initiated by an agent of the state. (Tr. pp. 8, 25). The first of these calls was Detective Mueller calling Mr. Born at the house asking to buy cocaine. (Tr. pp. 8, 25). When Mr. Born stated that he didn't think he could help him, Mueller asked petitioner Born to try to find him some cocaine and that he would call again tomorrow. (Tr. pp. 13, 24, 25). No cocaine transaction was finalized during that call. Mueller never spoke to Mr. Born again. (Tr. p. 16).

On April 16, 1986, Mueller again called the house. This time he spoke with Donald Mazzanti. (Tr. 8-9. 41-42). Mueller and Mazzanti discussed Mazzanti's selling Mueller two ounces of cocaine. (Tr. 9). Mazzanti told Mueller that he would call Mueller later to make the arrangements for the drug sale. (Tr. 9, 42). Mazzanti met Mueller later that evening at a lounge in

Streamwood, Illinois, some twenty miles from the defendant real estate, and sold Mueller two ounces of cocaine. (Tr. 9-10, 43).

Given these facts, the defendant real estate has no "substantial connection" to illegal drug activity. The inference that the real estate was involved to such a degree as to warrant forfeiture is dispelled by the opinion below. Circuit Judge Flaum stated in his concurring opinion that

> "(T)he dictates of 21 U.S.C. 881(a)(7) were minimally satisfied under the facts of this case,.." (App. A, p.9).

The lower court also stated that the government sought forfeiture of the defendant real estate from which the claimant was running his cocaine operation. (App. A, 3). This statement indicates the courts misapprehension of the factual predicate of the forfeiture action. The factual premise the government proceeded upon in this case is an isolated drug transaction that occurred some 20 miles from petitioner's home and was conducted by someone with no interest in the real estate. (Tr. 9, 14. 43).

Indeed, the proof at trial, taken in the light most favorable to the prevailing party, belies the contention that petitioner was operating a drug operation from his home. (Tr. 52-54). The facts of the case before Your Honors are that this is an isolated drug transaction that was connected to petitioner's home by virtue of two telephone calls from the agent. (Tr. 58-59). The government conceded at trial that they had no evidence

of drugs actually being on the premises. (Tr. 52-53). There was also no evidence that the petitioner used his home for any other transaction other than accepting the two telephone calls from the agent of the state.

Taking these facts and applying the "substantial connection" test that has been advanced by the circuits applying that standard would have ensured that petitioner's home was protected from this governmental overreaching. See e.g., U.S. v. One Ford Coach, 307 U.S. 219, 59 S.Ct. 861, 83 L.Ed 1249 (1939), wherein this Court stated that "(f)orfeitures are not favored; they should be enforced only when within both the letter and spirit of the law." *Id.* at U.S. 226. The forfeiture of petitioner's interest in his home of twenty years, given the facts of the case, is beyond the limits that Congress envisioned in the passing of the forfeiture statutes. See, e.g. Joint Explanatory Statement, *supra,* (requiring a "substantial connection" be established for a successful forfeiture); Senate Report No. 225, 98th Cong., 1st Sess. 195, *supra,* (property only fortuitously connected with drug trafficking should be preserved). Further, it is the contention of the petitioner that the application of the "substantial connection" criteria in a forfeiture action under 881(a)(7) is both within the letter and the spirit of the law. One Ford Coach, *supra,* at U.S. 226. Had the lower courts in this case properly applied this standard, petitioner's home could not have been forfeited to the government because the connection between the home and the drug activity was scant, and certainly not substantial. 124 E. North Ave., *supra* at 1353, (isolated use of phone to discuss a narcotics sale not enough to justify forfeiture); Various Parcels, *supra* at 65, (evidence of phone calls to and from home not enough to demonstrate substantial

connection); Certain Lots, *supra* at 1064 ('it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity,'; isolated use of home insufficient). Any connection between the defendant real estate and the criminal activity of Mazzanti was just too tenuous and far removed to support its forfeiture.

2. The opinion below relied on erroneous facts.

The panel's opinion in the court below places an erroneous reliance upon petitioner's conviction in Federal Court for charges that are in no manner related to the forfeiture case before Your Honors. The lower court stated that:

> "In October, 1986, the United States filed a complaint seeking the forfeiture of Born's house in Elgin, Illinois under 21 U.S.C. 881(a)(7). Prior to this action, Born was convicted of conspiracy to possess five kilograms of cocaine with intent to deliver and given a 23-year sentence. United States v. Born, No. 87CR 518 (N.D. Ill.) The government brought this forfeiture action to seize the real estate from which Born was running his cocaine operation." (App. A, 3).

The import of this assertion in the opinion is that Born was convicted of conspiracy and that this was the factual predicate crime for which the forfeiture action was brought. However, Born was charged in that case with a factually distinct crime occurring some 2 years after the proceedings in the instant civil action were commenced. Moreover, the case relied upon by the

appeals court in no way involves Born's home of twenty years, nor is there any allegation in that proceeding that Born's home was even inferentially connected to the drug conspiracy charges that resulted in that conviction. See U.S. v. Born, 888 F.2d 1165, (7th Cir. 1989)

Of equal importance is the fact that Born nor Mazzanti were charged in state court with conspiracy. The charge against both was delivery of a controlled substance. This charge was eventually dismissed against petitioner. (App. E). The complaint in the civil proceeding does not charge or even allege that Born was required to meet a conspiracy charge in the forfeiture proceeding. However, both the lower courts proceeded in the case as if Born and Mazzanti were charged with a conspiracy. In fact, the district court stated that:

> "this was Born's deal, he did violate 21 U.S.C. 841(a), in that he distributed, dispensed or possessed with intent to distribute or dispense a controlled substance.." (Tr. 67)

This finding was accepted by the appellate court without any factual support in the record. Born was not charged with conspiracy, Title 21 U.S.C. 846, in the civil complaint for this forfeiture action. Indeed, the courts analysis was based on the premise that Born had been convicted of a conspiracy charge thereby justifying the forfeiture of the defendant real estate. The practical effect of this misleading reliance on a non-existent fact is the Born, thereby the defendant real estate, was involved in a drug conspiracy.

The statutory violation that is at issue then can only

be the two ounce sale of cocaine to Mueller by Mazzanti. The record reflects that these drugs were purchased by Mazzanti from a person named Delysle. (Tr. 44). Thereafter Mazzanti contacted Mueller and made arrangements to meet him later to consummate the deal. (Tr. 9, 14, 43).

Born was not involved in the delivery of the cocaine, never possessed any cocaine, nor was the house used to sell or store the cocaine that Mazzanti sold to the agent. The charging instrument that was utilized to seize the defendant real estate did not state that it was seized due to its involvement in a conspiracy. Born's rights of due process certainly encompass the court charging a conspiracy against a citizen without notice from the charging instrument that a conspiracy was alleged and needed to be defended.

The 5th Amendment protects against unfounded accusations of this magnitude in that:

> "No person shall b... deprived of life, liberty or property without due process of law..."

The courts reliance upon Born's federal conviction for conspiracy to justify the forfeiture of his home of twenty years totally ignores the protections the 5th amendment to the constitution was meant to provide.

in Mathews v. Eldridge, 424 U.S. 319 (1976), this Honorable Court identified three factors that should be considered in assessing whether a governmental deprivation complies with the dictates of federal due process: (1) the private interest affected, (2) the risk of an erroneous deprivation, and (3) the government's

interest in employing the challenged procedure.

Forfeiture of real property, here Born's family home, does infringe on a protected interest because the right to own and keep property is Constitutionally mandated under the 5th Amendment.

As can be seen from the opinion below, the panel of Judges were under the mistaken impression that Born had been convicted of the underlying offense that precipitated the forfeiture action, that the entire drug transaction was arranged over Born's home phone & that Born operated a drug business from his home. These erroneous assumptions of facts served to deny Born the protections afforded a citizen under the 5th amendment. Had the lower court applied the statute as Congress intended the statute to apply and with the correct facts before them, forfeiture would be denied in this case.

CONCLUSION

Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgement of the court below.

Respectfully submitted,

Paul F. Born III
Petitioner pro se
P.O. Box 1000
Oxford, WI 53952

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-3361
United States of America,

Plaintiff-Appellee,

v.

One Parcel of Real Estate Commonly Known
As 916 Douglas Avenue, Elgin, Illinois,

Defendant,

Paul F. Born, III,

Claimant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7645 — Charles P. Kocoras, *Judge.*

Argued November 3, 1989[1] — Decided May 29, 1990

Before Bauer, *Chief Judge,* and Flaum and Kanne, *Circuit Judges.*

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[1] This opinion was circulated among all judges of the court in regular active service pursuant to Circuit Rule 40(f) because of an apparent conflict with *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989), and *United States v. Premises Known as 3639-2nd Street, N.E.*, 869 F.2d 1093 (8th Cir. 1989). A majority of the judges did not favor a rehearing *en banc.*

Bauer, *Chief Judge.* This is an appeal from a judgment of forfeiture in favor of the United States against Paul F. born, III. The district court found that Born had used his one-third interest in property at 916 Douglas Avenue, Elgin, Illinois, to facilitate the felony distribution of cocaine, and ordered the forfeiture of the property pursuant to 21 U.S.C. § 881(a)(7). Born claims that because no substantial connection existed between the cocaine and his property the order of forfeiture was improper. We disagree with Born's suggested construction of the statute and affirm.

I.

Paul F. Born, III was apparently no stranger to drug transactions. On February 20, 1986, he met with John Mueller, an undercover investigator for the Cook County States Attorney's Office at the Corfu Restaurant in Hanover Park, Illinois. Born had already served time in prison for narcotics trafficking and had also been convicted for weapons offenses. Mueller offered to sell Born a kilogram of cocaine, but Born declined because he was in the process of selling a kilogram he had just purchased. Born gave Mueller his home phone number and the two agreed to keep in touch.

On April 15, 1986, Mueller called Born at home and explained that he was out of cocaine and needed two ounces. Born stated that the quantity was not a problem and agreed to sell Mueller the cocaine for

$1600 an ounce.[2] Born concluded the conversation by instructing Mueller to call him at home the next day to arrange a time and place for the deal.

The next morning, Mueller again called Born's home, but the phone was answered by Don Mazzanti. Mazzanti explained that Born was asleep and could not come to the phone. When Mueller said that he was calling about the purchase of two ounces of cocaine, Mazzanti told him to try again later when Born was awake. Later that day, however, Mazzanti called Mueller and arranged to deliver the cocaine that evening at the Player's Lounge in Streamwood, Illinois.

That night the deal took place as arranged. Outside the lounge, Mazzanti got into Mueller's vehicle. Mueller gave Mazzanti $3200 in exchange for the cocaine. Mazzanti explained to Mueller that, should ever need more cocaine he should call Born again. This initial delivery was, according to Mazzanti, Born's way of feeling out Mueller to make sure he was legitimate.

In October, 1986, the United States filed a complaint seeking the forfeiture of Born's house in Elgin, Illinois under 21 U.S.C. § 881(a)(7). Prior to this action, Born was convicted of conspiracy to possess five kilograms of cocaine with intent to deliver and given a 23-year sentence. *United States v. Born*, No. 87 CR 518 (N.D. Ill.) The government brought this forfeiture action to

---

[2] In his brief, Born claims that he told Mueller that he could not help him and never discussed the price or delivery of the cocaine. The district court found Mueller's testimony the more credible, though, and we will not lightly overturn such findings.

seize the real estate from which Born was running his cocaine operation.

Following a bench trial, the district court held the Born's house was used to facilitate his drug business and ordered forfeiture of Born's one-third interest in the real estate.[3] Born subsequently filed a timely notice of appeal and the district court entered a stay pending this court's determination.

II.

Our threshold issue for determination on this appeal is whether a "substantial connection" must be demonstrated between the property and the underlying drug offense in order to justify forfeiture under 21 U.S.C. § 881(a)(7). Born contends that such a requirement is necessary to harmonize the forfeiture statute with Congressional intent. The government, of course, argues for a stricter reading of the statute.

The controlled Substances Act of 1970, 21 U.S.C. §§801-970, included a civil forfeiture provision which called for the forfeiture of several forms of property used to transport "or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of" illegal drugs. 21 U.S.C. § 881(a)(4). This section provided for the forfeiture of automobiles, trucks,

---

[3] The remaining two-thirds interest in the real estate is held by Born's parents, Mr. and Mrs. Paul F. Born, Jr. The order entered by Judge Kocoras provides that the U.S. Marshall may, in his discretion, offer to sell the premises for a reasonable price to Mr. and Mrs. Born. If not, the parents are entitled to two-thirds of the proceeds, after the deduction of any expenses, of any sale.

aircraft, drug containers, raw materials used in the manufacturing process and the illegal drugs themselves, among other property. Significantly absent were provisions calling for the forfeiture of money or things of value exchanged for illegal drugs and real estate used to facilitate the commission of a drug felony. In 1978, Congress added § 881(a)(6) providing for dealing.[4] Six years later, Congress closed another loophole by passing an amendment which added § 881(a)(7), the provision at issue here, which extended forfeiture to real estate. This provision states, in part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (7) All real property . . . which is used, or intended to be used, *in any manner or part*, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment....

(Emphasis added). As with any question of statutory interpretation, our "starting point must be the language employed by congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). *See also Consumer Product Safety Commission v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980). This court has stated that we will look beyond

---

[4] Section 881(a)(6) provides for forfeiture of moneys, negotiable instruments, and/or securities "used or intended to be used to facilitate any violation of this subchapter." Significantly, the language "in any manner or part" used in both § 881(a)(4) and §881(a)(7) is absent. This has led to a narrower reading of this section. *See United States v. Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

the express language of a statute only where that statutory language is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme. *See United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978).

Here, the language of the statute is clear, straight forward and unambiguous. Forfeiture is appropriate if the property is "used, or intended to be used, in any manner or part, to commit or to facilitate the commission of" a drug offense. Congress intended to reach all real property used to promote the drug trade. It is a broad, sweeping amendment which grants wide powers to the executive branch for the limited purpose of combating the flow of illegal drugs. Grafting an implied "substantial connection" test on to the plain language of this statute would not avoid ambiguity or the frustration of the Congressional scheme, but promote them. We see no reason to read the penalties of this statute more narrowly than the plain language demands.

Indeed, Born does not contend that the addition of this "substantial connection" test is necessary to avoid an absurd result or frustration of the statutory scheme. Instead, Born relies on a section of the Senate Report to the 1984 amendment adding § 881(a)(7) to bolster his argument. The Supreme Court has stated that when statutory language is unambiguous, it is presumed to express the legislative purpose and resort to the legislative history is not necessary. *See American Tobacco Company v. Patterson*, 456 U.S. 63, 68 (1982). Nevertheless, despite the clear wording of 881(a)(7), Born points to a section of the Senate Report which

address the problems to be corrected by the new amendment. This particular discussion states:

> Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he used a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, *even though its use was indispensable to the commission of a major drug offenses* and the prospect of the forfeiture of the property would have been a powerful deterrent.

S.Rep No. 225, 98th Cong., 1st Sess. 195, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3378 (emphasis added in Appellant's brief). Born reads this section to imply that congress did not intend the forfeiture statute to apply to property with only an incidental or fortuitous connection to the drug business, but only to real estate which is "substantially connected" to illegal activity. While we agree that the property must have more than an incidental or fortuitous connection to criminal activity, we decline to read the statute more leniently than this.

The Senate Report cites some of the more egregious examples created by the loophole in the forfeiture statute. By omitting real estate from § 881(a), Congress had inadvertently left a wide range of property used to facilitate commerce in illegal drugs outside of its reach. The legislation itself, however, no more demands that the property be "substantially connected" to the underlying offense than it requires that the property be

"indispensable" to the crime. Yet, "indispensable" is precisely the word used in portions of the Senate Report relied upon by Born. Even Born concedes that an "indispensability" requirement would be a misreading of the statute.

Born's selective use of the legislative history as our controlling guide to the statute could also lead to other absurd results. A literal interpretation of this passage in the Senate Report could also limit forfeiture only upon the discovery of "tons of marijuana" rather than merely several kilograms, or demand that homes be used as "manufacturing laboratories for amphetamines" instead of simple storage areas for the drugs. We would not tolerate such a reading of the plain language in a statute, nor will we give such an absurd reading to a legislative history.

We must note, however, that Born's position is not without some support from other jurisdictions. The fourth Circuit has held that a "substantial connection" is required for forfeiture under § 881(a)(7). *See United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990); *United States v. Santoro*, 866 f.2d 1538 (4th Cir. 1989). In *Schifferli*, the court affirmed the forfeiture of a dentist's office for illegal distribution of prescription drugs because a "substantial connection" existed between the office and the offense. The court stated, however, that

> [It is] irrelevant whether the property's role in the crime is integral, essential or indispensable. The term "facilitate" implies that the property need only make the prohibited conduct "less difficult or 'more of less free from hinderance.'" Just one use of the property may be enough, given that a single

violation is sufficient under § 881(a)(7).

Id. at 990 (citations omitted). Thus, although the Fourth Circuit has adopted a "substantial connection" test, the differences between this approach and our own appear largely to be semantic rather than practical.

The Eighth Circuit has also employed a "substantial connection" test. *United States v. Premises Known as 3639 2nd Street, N.E.*, 869 F.2d 1093 (8th Cir. 1989) In *3639 2nd Street,* the Eight Circuit reversed a district court ruling denying forfeiture and held that a substantial connection did indeed exist between the sale of cocaine and the defendant's house. The court expressly overruled the district court's requirement of a continuing drug business or ongoing operation. *Id.* at 1096. Instead, holding that "we believe that if persons 'make real property available as a situs for an illegal drug transaction, it is forfeitable.'" *Id.* (quoting *United States v. 26.075 Acres,* 687 F.Supp. 1005, 1014 (E.D.N.C. 1988)). Circuit Judge Arnold added, in a concurring opinion, that the court did not "depart from its past insistence that there must be a substantial connection between the property being forfeited and a drug related crime." 869 F.2d at 1098.

Given these cases, the distinction between a "substantial connection" test and the "in any manner, or part" language offered directly in the statute is blurry at best. We believe the more principled and direct approach, and the one demanded by the plain wording of the statute itself, is to affirm forfeiture of any real estate that is used *in any manner or part* to commit or

facilitate the commission of a drug related offense.[5]

Applying our standard to the case at hand, our inquiry is limited to whether the connection between the underlying drug transaction and Born's property was more than incidental or fortuitous. The facts before us make this a rather simple proposition. Born had met with agent Mueller and was familiar with his interest in the sale or purchase of cocaine. When Mueller called Born at his home telephone number on April 15, 1986, Born negotiated the price and quantity of cocaine to be sold the next day. When Mueller called Born's number again on April 16, he was able to arrange the entire transaction with Mazzanti who stated over the phone that he was acting for Born. Later that evening, when the transaction between Mueller and Mazzanti was completed, Mazzanti stated that he was "feeling out" Mueller as to the possibility of additional transactions between Born and Mueller. Given this history, we are satisfied that the district court properly found that the nexus between Born's house and the drug offense was not incidental or fortuitous.

III.

A "substantial connection" is not required between the property and the related drug offense for forfeiture of

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[5] Several circuits have declined to require a "substantial connection" test for forfeiture under § 881(a)(4), the provision from which the language in § 881(a)(7) is drawn. *See United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 423 (2nd Cir. 1977). One circuit has even refused to impose a "substantial connection" test under the stricter language of § 881(a)(6). *See United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357 (9th Cir. 1986).

real estate under 21 U.S.C. § 881(a)(7). Instead, the government must only demonstrate that the nexus is more than incidental or fortuitous. the district court properly found that s sufficient nexus existed between Born's house and the illegal drug transaction to justify forfeiture under 21 U.S.C. § 881(a)(7). The loss of one's home for the sale of a small amount of cocaine is undoubtedly a harsh penalty. But Congress has intended this harsh punishment for those who sell illegal drugs. *Dura lex, sed lex.* The forfeiture of Born's one-third interest in the property at 916 Douglas Road, Elgin, Illinois is, therefore,

AFFIRMED.

FLAUM, *Circuit Judge*, concurring. I concur in the judgment of the Court that Born's property was used "in any manner or part to commit or to facilitate" a drug transaction. I write separately to express my view that while the dictates of 21 U.S.C. § 881(a)(7) were minimally satisfied under the facts of this case, there might be situations where the application of the broadly-written provision would raise eighth amendment concerns. Although the "substantial connection" test advanced by the claimant invites courts to engraft a somewhat appealing and equitable gloss on the statute, the basis for such interpretation was not supplied by Congress. As the majority has properly noted, any such reading of the statute can only be the result of further congressional action, not judicial fiat.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 16, 1990

Before

Hon. William J. Bauer, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Michael s. Kanne, Circuit Judge

UNITED STATES OF AMERICA

Plaintiff-Appellee,

No. 88-3361 vs.

ONE PARCEL OF REAL ESTATE c/k/a 916 DOUGLAS AVENUE, ELGIN, ILLINOIS

Defendant,

PAUL F. BORN, III,

Claimant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois

No. 86 C 7645

Charles P.Kocoras, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Paul F. Born, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
vs.	)	No. 86 C 7645
ONE PARCEL OF REAL ESTATE, etc.,	)	Judge Charles P. Kocoras
Defendant	)	

JUDGMENT ORDER

This action having come before the court for trial, the court having considered the evidence and the arguments of the parties and having made oral findings of fact and conclusions of law, it is hereby

ORDERED that judgment is entered in favor of the plaintiff forfeiting to the United States of America the following described real property pursuant to 21 U.S.C. § 881(a)(7):

Lot 5 in Block 4 of Lovell's Grove Second Addition to Elgin, in the City of Elgin, Kane County, Illinois,

commonly known as 916 Douglas Avenue, Elgin, Illinois, and it is further

ORDERED that the United States Marshall shall dispose of said property according to law by selling said property and after deducting his expenses, distributing the net proceeds as follows:

One-third to the United States,

Two-thirds to Paul F. Born, Jr., and his wife, Miriam M. Born.

The United States Marshal may, in his discretion, offer to sell the property to Paul F. Born, Jr., and his wife Miriam M. Born for an amount which the Marshal determines would equal the share of the United States if sold to a third-party. In the event of such a sale to Mr. and Mrs. Paul Born, Jr., the entire proceeds shall be distributed to the United States.

ENTER:

_____

UNITED STATES DISTRICT JUDGE

Dated: _____

Supreme Court of the United States

No. A-246

Paul F. Born, III,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 13, 1990.

/s/ John Paul Stevens

Associate Justice of the Supreme Court of the United States

Dated this 1st
day of October, 1990

PROSECUTOR'S REPORT ON DISPOSITION OF CHARGES

TO: Joseph Petrovsky, Warden (Superintendent) 5 October 1989 (Date)

U.S. Medical Center for Federal Prisoner
(Name of Institution in which the Prisoner was originally imprisoned)

(Street Address)

Springfield, (City) Missouri (State) 65808 (Zip Code)

Paul Born (Name of Inmate) #95228-024 (Number)

to the Interstate Agreement on Detainers for trial based on the pending charge or charges contained in the Agreement on Detainers, Form II (If transfer was at the request of inmate) or in Forms IV and V (IF transfer was at request of the prosecutor).

The disposition of the pending charge or charges in this jurisdiction was as follows:

DISPOSITION: 87-1939, delivery controled substance, on 09/25/89 before the honorable Ralph Reyna, M/S NOLLE PROSSE. Since the defendant is no longer wanted. REMOVE and RETURN any DETAINER FILED.

/s/
Assistant State's Attorney

Circuit Court of Cook County, Illinois
Jurisdiction

AGREEMENT ON DETAINERS - FORM IX

(2)

No. 90-873

Supreme Court, U.S.
FILED
FEB 1 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

PAUL F. BORN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney
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QUESTIONS PRESENTED

1. Whether 21 U.S.C. 881(a)(7), which provides for forfeiture of real property used to facilitate commission of a drug offense, requires the government to show that the property was "substantially connected" to drug trafficking.

2. Whether, in affirming the judgment of forfeiture, the court of appeals improperly relied on petitioner Born's unrelated drug conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-873

PAUL F. BORN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1-12)[1] is reported at 903 F.2d 490.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1990. A petition for rehearing was denied on July 16, 1990. Pet. App. B. On October 1, 1990, Justice Stevens extended the time within which to file a petition for a writ of certiorari to Decem-

[1] Because the pages in the appendix to the petition for a writ of certiorari are not sequentially numbered, we have, for present purposes, assigned separate designations to the materials in the appendix. "Pet. App. A" is the opinion of the court of appeals, etc.

ber 13, 1990, Pet. App. D, and the petition was filed on December 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this civil action in the United States District Court for the Northern District of Illinois seeking the forfeiture, pursuant to 21 U.S.C. 881(a)(7), of petitioner Born's one-third interest in a house. After a bench trial, the district court entered judgment in favor of the United States. Pet. App. C. The court of appeals affirmed. Pet. App. A 1-12.

1. The evidence at trial showed that petitioner used his house to conduct telephonic negotiations for cocaine transactions.[2] On February 20, 1986, petitioner met with John Mueller, a state undercover investigator. At that time, petitioner had a record of previous convictions for drug trafficking and weapons offenses. Mueller offered to sell a kilogram of cocaine to petitioner, but petitioner declined the offer because he was in the process of selling a kilogram that he had just purchased. However, petitioner gave Mueller his home telephone number, and the two men agreed to stay in touch with each other. Pet. App. A 2.

On April 15, 1986, Mueller telephoned petitioner at his home and told him that he needed two ounces of cocaine. Petitioner said he could provide that quantity at a price of $1,600 per ounce and told Mueller to call him the next day at petitioner's home to arrange a time and place for the transaction. Mueller complied with petitioner's directions, but the

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[2] Because petitioner Born is the only individual claimant in this in rem action, we shall refer to him as "petitioner."

telephone was answered by Don Mazzanti instead of petitioner. When Mueller said he was calling about buying two ounces of cocaine, Mazzanti said that Mueller should call again later because petitioner was asleep. Later in the day, however, Mazzanti telephoned Mueller and arranged to deliver the cocaine. That night, Mueller and Mazzanti met as arranged, and Mueller gave Mazzanti $3,200 for two ounces of cocaine. Mazzanti told Mueller that this initial delivery was petitioner's way of making sure that Mueller was legitimate. Mazzanti also told Mueller to call petitioner again whenever Mueller needed cocaine. Pet. App. A 2-3.

2. After the United States instituted this action seeking forfeiture of petitioner's one-third interest in the house, petitioner filed a claim to that interest and contested the forfeiture. He argued that the United States could prevail under 21 U.S.C. 881 (a)(7) only if it showed that petitioner's house had a "substantial connection" to drug trafficking. The district court rejected that legal contention, Tr. 67-68, but found in any event that petitioner's house was "clearly used to facilitate the drug business." Tr. 66-67. Accordingly, the district court entered judgment in favor of the government. Pet. App. C 1-2.[3]

3. The court of appeals affirmed the judgment of forfeiture, likewise rejecting petitioner's contention

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[3] The district court's judgment provides that the United States Marshal may offer to sell petitioner's one-third interest in the house to his parents, who own the remaining two-thirds interest. If petitioner's parents decline the offer, the property is to be sold and petitioner's parents will be entitled to two-thirds of the proceeds, after deductions for expenses associated with the sale. Pet. App. A 4 n.3; Pet. App. C 1-2.

that an independent "substantial connection" test must be applied under Section 881(a)(7). Pet. App. A 1-12. The court of appeals pointed out that Section 881(a)(7) broadly provides for forfeiture of "[a]ll real property . . . which is used, or intended to be used, *in any manner or part*, to commit, or to facilitate the commission of [a felony violation of Title 21]." Pet. App. A 5 (quoting 21 U.S.C. 881(a)(7) (emphasis supplied by court of appeals)).[4] In the court's view, this "sweeping" language is "clear, straightforward, and unambiguous," and establishes that "Congress intended to reach all property used to promote the drug trade." Pet. App. A 6. The court explained that "[g]rafting an implied 'substantial connection' test on to the plain language of this statute would not avoid ambiguity or the frustration of the Congressional scheme, but promote them." *Ibid.* Accordingly, the court saw "no reason to read the penalties of this statute more narrowly than the plain language demands." *Ibid.*

The court of appeals pointed out that petitioner in fact "[did] not contend that the addition of this

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[4] Section 881(a) provides in pertinent part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

'substantial connection' test is necessary to avoid an absurd result or frustration of the statutory scheme." Pet. App. A 6. Instead, petitioner relied on a passage in the Senate Report on the 1984 amendments in which Paragraph (7) was added to 21 U.S.C. 881(a) in order to extend its coverage to real property.[5] A portion of the Senate Report discussing the need for Paragraph (7) explained that under then-current law, there was no provision for forfeiture of real property, even when its use was "indispensable to the commission of a major drug offense." S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983). Petitioner contended that this passage implied that Congress did not intend the forfeiture statute to apply to property having "only an incidental or fortuitous connection to the drug business." Pet. App. A 7. The court of appeals agreed that "the property must have more than an incidental or fortuitous connection" to drug trafficking, but it did not believe an interpretation more lenient than that was warranted by the passage in the Senate Report upon which petitioner relied. Rather, the court reasoned, the Senate Report was merely citing "some of the more egregious examples created by the loophole in the forfeiture statute" when it did not cover real property. Pet. App. A 7. The court also noted that although "indispensable" is the term used in the Senate Report, even petitioner conceded that an " 'indispensability' requirement would be a misreading of the statute." *Id.* at 7-8.

The court of appeals recognized that two circuits have ruled that Section 881(a)(7) requires a showing of a "substantial connection" to a drug offense.

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[5] See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 306(a), 98 Stat. 2050.

See Pet. App. A 8-9 (citing *United States* v. *Schifferli*, 895 F.2d F.2d 987, 990 (4th Cir. 1990); *United States* v. *Santoro*, 866 F.2d 1538 (4th Cir. 1989); and *United States* v. *Premises Known As 3639-2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989)). The court below concluded, however, that any difference between its formulation and that of the Fourth and Eighth Circuits is largely "semantic rather than practical," since those courts, in the very decisions cited, had affirmed forfeitures involving only a single use of a house and required no more than a showing that the property made the prohibited conduct less difficult. Pet. App. A 8-9; see *Schifferli*, 895 F.2d at 990; *Premises Known as 3639-2nd St.*, 869 F.2d at 1096-1097.

Applying the language of the statute to the facts of this case, the court below concluded that petitioner's house had been used to facilitate the drug offense. Thus, the court concluded, the connection between the house and the offense was more than "incidental or fortuitous." Pet. App. A 10.[6]

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[6] Judge Flaum concurred. He agreed that the court had applied the correct statutory test and that the facts of this case satisfied the statutory standard, but he believed that there might be situations in which application of the statute would raise Eighth Amendment concerns. Pet. App. A 12.

Because of an "apparent conflict" between the decision below and the decisions of the Fourth and Eighth Circuits, the panel circulated the decision among all judges of the Seventh Circuit, but a majority did not favor rehearing en banc. Pet. App. A 1 n.1.

ARGUMENT

1. The court of appeals correctly affirmed the forfeiture of petitioner's one-third interest in the property, and its holding is consistent with that of other courts of appeals. Petitioner contends (Pet. 8-20) that the court of appeals erred in declining to engraft an independent "substantial connection" test onto Section 881(a)(7) and that the decision below conflicts in this respect with decisions of other courts of appeals. Although some other courts have stated that the property must have a "substantial connection" to drug activities, the court below correctly concluded that the differences in formulation are essentially semantic. In particular, other courts of appeals have made clear that the phrase "substantial connection" merely serves to exclude from forfeiture property that has only an "incidental or fortuitous" connection to the drug offense. The court below specifically agreed with that view of 21 U.S.C. 881(a)(7), but found in the circumstances of this case that the property *did* have more than an incidental or fortuitous connection to drug trafficking. Because the courts of appeals are in fundamental agreement concerning the scope of 21 U.S.C. 881(a)(7), review by this Court is not warranted.

a. As the court of appeals recognized, Pet. App. A 5-6, the text of 21 U.S.C. 881(a)(7) is straightforward and unambiguous. It broadly provides for forfeiture of "[a]ll real property" used "in any manner or part" to commit, or facilitate commission of, a prohibited drug offense. There is no suggestion in this language of an additional statutory requirement that the property be shown to have had a "substantial connection" to drug trafficking. This Court "[has] repeatedly recognized that '[w]hen . . . the

terms of a statute [are] unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances.' " ' " *United States* v. *James*, 478 U.S. 597, 606 (1986) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). The Court has applied that principle in the forfeiture context, noting that "[i]f the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Russello* v. *United States*, 464 U.S. 16, 20 (1983) (quoting *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). See also *United States* v. *Monsanto*, 109 S. Ct. 2657, 2662 (1989) (giving effect to all-inclusive language of the criminal forfeiture statute, 21 U.S.C. 853(a)(1), that provides for forfeiture of "any" property representing the proceeds of drug transactions).[7] Accordingly where, as here, the government shows that real property was used to facilitate a drug offense, it is properly forfeited to the United States under 21 U.S.C. 881(a)(7).

In arguing that Section 881(a)(7) should be construed to embody an independent "substantial connection" test, petitioner relies (Pet. 15-16) not on the language of the statute but on a passage in the Senate Report that discusses the shortcomings of the pre-1984 statute. The Report noted that there was no provision for civil forfeiture of real property, "even though its use was indispensable to the commission of a major drug offense." S. Rep. No. 225, *supra*, at 195. Petitioner seizes upon the Report's use of the word "indispensable" in arguing that Section 881

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[7] The criminal statute also provides, in language parallel to that in 21 U.S.C. 881(a)(7), for forfeiture of property used to facilitate a drug offense. See 21 U.S.C. 853(a)(2).

(a)(7) should be construed to embody a "substantial connection" test. However, as the court of appeals explained, the passage in the Senate Report upon which petitioner relies merely recited the most egregious consequences of the then-existing loophole that excluded real property from coverage. Pet. App. A 7. It did not purport to contain an exhaustive list of the situations in which Section 881(a)(7) would apply. "[T]he language of a statute * * * is not to be regarded as modified by examples set forth in the legislative history." *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990). Moreover, as the court of appeals also pointed out, petitioner in fact does not even urge adherence to the legislative history, because he conceded below that an "indispensability" requirement would be too stringent and distort the statute. Pet. App. A 8. Thus, petitioner fails to point to anything in the legislative history of Section 881(a)(7) that supports an independent "substantial connection" requirement. Consequently, "[t]he fragments of legislative history cited by [petitioner], regardless of how liberally they are construed, do not amount to a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982).[8]

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[8] Petitioner also relies (Pet. 14) on a sentence in the Statement of Managers regarding the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a), 92 Stat. 3777, in which 21 U.S.C. 881(a)(6) was enacted. The sentence states that "it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." 124 Cong. Rec. 34,671 (1978). Petitioner fails to point out that the remainder of the pertinent paragraph in the Statement of Managers on the 1978 Act explains that this limitation is embodied in the text of the

In sum, the only showing the government must make when seeking civil forfeiture of real property in circumstances such as these is the one expressly required by the text of 21 U.S.C. 881(a)(7)—namely, that the property was used to commit, or facilitate commission of, a drug offense. There is no independent requirement under 21 U.S.C. 881(a)(7) that the government show that the property had a "substantial connection" to a drug offense, and the courts are not at liberty to amend the statute. Of course where, as here, the express statutory requirement is satisfied, the fact that the property was used to facilitate commission of a drug offense might well be said to establish in itself that the property had a substantial connection to the offense. It is quite another thing, however, to set up the phrase "substantial connection" as a separate statutory requirement, as petitioner urges, wholly independent of the term "facilitate" in Section 881(a)(7).

b. Petitioner contends (Pet. 8-13) that the Court should grant review because there is a conflict among the circuits on whether Section 881(a)(7) requires a showing of a "substantial connection" between the

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new Section 881(a)(6) itself. Accordingly, even if we assume, arguendo, that this legislative history of a prior Act is relevant here, the passage petitioner cites undermines his argument that courts should apply a "substantial connection" test under Section 881(a)(7) that is independent of, and in addition to, the express requirement that the government show that the property was used to commit, or to facilitate commission of, a drug offense. The legislative history of the 1978 Act is unilluminating for the further reason that, as the court of appeals noted, Pet. App. A 5 n.4, Section 881(a)(6), unlike Section 881(a)(7), does not contain the broad reference to property that was used "in any manner or part" to facilitate a drug offense.

property and the drug offense. As the court below recognized, the Fourth and Eighth Circuits have concluded that the government must show such a "substantial connection." However, as the court below further recognized, there is no difference in substance between the approaches the various courts have taken.

In *Schifferli*, the Fourth Circuit explained that "[u]nder the substantial connection test, the property either must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. At minimum, the property must have more than an incidental or fortuitous connection to criminal activity." 895 F.2d at 990. Similarly, in *Premises Known As 3639-2nd St., N.E.*, the Eighth Circuit observed that Section 881(a)(7) "requires something more than an incidental or fortuitous contact between the property and the underlying illegal activity, although the property need not be indispensable to the commission of a major drug offense. The statute clearly provides for the forfeiture of property used or intended to be used to commit or facilitate a violation of Title 21." 869 F.2d at 1096.[9] These explanations make clear that the Fourth and Eighth Circuits, like the court below, focus on the statutory standard of whether the property was used to commit, or facilitate commission of, a drug offense—which they regard as the equivalent of a "substantial connection" to the drug offense—and that the operative effect of the "substantial connection" test

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[9] The Eighth Circuit went on to reject the claimant's argument that the government had failed to establish a substantial connection between the house in question and illegal activity, finding that the house had been used "in the commission or facilitation of a narcotics offense." *Id.* at 1097.

is merely to exclude from forfeiture property having only an "incidental or fortuitous" connection to drug trafficking. The Seventh Circuit in this case expressly *agreed* with the proposition that the property must have more than an "incidental or fortuitous connection to the drug business." Pet. App. A 7.

Both the Fourth and Eighth Circuits further articulated the statutory standard by explaining that property is used to "facilitate" a drug offense if it makes the prohibited conduct "less difficult" or "more or less free from obstruction or hindrance." See *Schifferli*, 895 F.2d at 990; *Premises Known as 3639-2nd St.*, 869 F.2d at 1096-1097. The Seventh Circuit in this case expressed agreement with this formulation as well, and indeed relied upon it in explaining why "the differences between this approach and [the Seventh Circuit's] approach appear largely to be semantic rather than practical." Pet. App. A 8-9.[10] For these reasons, there is no genuine conflict

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[10] Petitioner also argues (Pet. 9-12) that review is warranted because other circuits have also adopted the "substantial connection" test under Section 881(a)(7). The First Circuit did state in *United States* v. *Parcel of Land & Residence at 28 Emery Street*, 914 F.2d 1, 3-4 (1990), that it had consistently required a showing of a "substantial connection." But it expressly followed the Fourth and Eighth Circuits in doing so, and it did not suggest that the approach it was taking differed from the one followed in those circuits—which in turn does not differ in substance from that followed by the Seventh Circuit in this case. In fact, the First Circuit quoted, without disagreement, the Seventh Circuit's observation in this case that, in practice, the difference in approach is "blurry at best." 914 F.2d at 4 n.8; see Pet. App. A 9.

United States v. *Property Known As 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989) (see Pet. 10), dealt with the distinct question of the requirements of the so-called "innocent owner" defense under 21 U.S.C. 881(a)(7), not with

among the circuits warranting review by this Court.[11]

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the government's burden of proof. *United States* v. *526 Liscum Drive*, 866 F.2d 213 (6th Cir. 1988) (see Pet. 11), dealt with a claimant's standing to challenge a forfeiture. 866 F.2d at 217. The court, in dicta, discussed general principles of forfeiture law, including a "substantial connection" requirement, but that issue was not involved, and the court did not in any event elaborate upon the requirement in a way that conflicts with the application of Section 881(a)(7) in this and other cases. See 866 F.2d at 216. Finally, although petitioner cites (Pet. 12) *United States* v. *Four Parcels of Real Property in Greene & Tuscaloosa Counties*, 893 F.2d 1245 (11th Cir. 1990), for the proposition that the Eleventh Circuit has adopted a "substantial connection" test, that case arose not under Section 881(a)(7), but under Section 881(a)(6), which lacks the "in any manner or part" language of Section 881(a)(7). See note 8, *supra*. Moreover, the Eleventh Circuit recently made clear that the appropriateness of a "substantial connection" test remains open in that circuit, and it observed, quoting the decision below, that the conflict among other courts on that question "may well be 'semantic rather than practical.'" *United States* v. *Approximately 50 Acres of Real Property*, No. 90-5354 (Jan. 10, 1991), slip op. 1208. As petitioner acknowledges (Pet. 9-12), the remaining courts of appeals have either rejected a "substantial connection" requirement or not yet addressed the question.

[11] Petitioner does not dispute the district court's finding, affirmed by the court of appeals, Pet. App. A 10, that the house was "clearly used to facilitate the drug business," Tr. 66-67, and therefore was properly forfeited to the United States under the court of appeals' view of Section 881(a)(7). He does argue (Pet. 17-20), however, that the facts of this case do not satisfy the "substantial connection" test, which he contends imposes a higher standard. Contrary to petitioner's contention, however, there is no difference in substance between the decisions requiring a showing of a "substantial connection" and the decision below. Petitioner's fact-

2. Petitioner also argues (Pet. 20-23) that the court of appeals relied on improper evidence in affirming the district court's judgment. This claim is without merit.

Petitioner complains of the court of appeals' recitation of the fact that he was separately convicted for cocaine trafficking, and that the government then filed the instant forfeiture action in order "to seize the real estate from which [petitioner] was running his cocaine operation." Pet. App. A 3-4. Petitioner correctly points out that his conviction was for activity unrelated to the instant forfeiture, and he claims that the court below relied on the conviction in order to sustain the forfeiture. Petitioner fails to note, however, that the court below mentioned his unrelated conviction only once, in setting out the background of the case, and did not otherwise refer to the conviction. Beyond that, it is clear that the court of appeals did not rely on the fact of petitioner's conviction in any way in affirming the judgment of forfeiture. In-

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bound submission regarding the application of that test in this case therefore does not warrant review.

In any event, for the reasons summarized by the court of appeals, the use of the house in connection with drug trafficking in this case plainly was not "incidental or fortuitous." Pet. App. A 10. Petitioner gave undercover officer Mueller his home telephone number so that Mueller could call him there if he was interested in drug transactions. When Mueller subsequently called petitioner at the house on April 15, 1986, they negotiated the drug transaction that was consummated the next day. Mazzanti, who had answered another call petitioner made to the house, told petitioner that the initial delivery was petitioner's way of feeling out Mueller to make sure he was legitimate, and Mazzanti told Mueller that he should call petitioner again if he needed more cocaine. *Id.* at 2-3, 10. Petitioner thus held out his house as the place where drug transactions were to be initiated.

stead, the court specifically relied on petitioner's and Mazzanti's dealings with Agent Mueller and the cocaine transaction that they negotiated and carried out. See Pet. App. A 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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